84-1253
84 -253

No.

Office - Supreme Court, U.S.
FILED
FEB 4 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1984

KENNETH R. GEORGE and ALBERTA W. GEORGE,

Petitioners,

vs.

UNITED KENTUCKY BANK, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF JEFFERSON COUNTY, KENTUCKY, FOURTH DIVISION

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QUESTION PRESENTED FOR REVIEW

Is the right of a litigant to procedural due process, guaranteed by the Constitution of the United States, Amendment 14, §1 violated when a trial court denies a litigant a requested opportunity which, objectively and indisputably, is afforded by state law indisputably in force and which is essential to the litigant having the ability to introduce evidence in an effort to rebut proof, for the first time presented to establish a previously unalleged fact, which, if not rebutted, provides the previously non-existent basis for entry of judgment ordering the litigant to pay multi-millions of dollars?

LIST OF ALL PARTIES

The parties in the instant case are only three in number. Each is named in the caption of this petition. However, at this time, Respondent, United Kentucky Bank, Inc., has merged by acquisition with Liberty National Bank and Trust Company which is United Kentucky Bank, Inc.'s successor in interest.

Petitioners are unaware of the organizational infrastructure of Respondent; thus, this information is not provided in this petition.

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OPINION DELIVERED BELOW

There was only one opinion, and there were no official nor unofficial reports delivered in the courts below relative to the subject matter addressed by this petition. The opinion was rendered by the Kentucky Court of Appeals and is included, in its entirety, in the Appendix. (App. H) Though presented for resolution (App. G, I, K) by the Kentucky Court of Appeals, the opinion in no way addresses the violation claimed by Petitioners here. The refusal of the Kentucky Court of Appeals to address the violations presented to this court by this petition perpetuated the violation accomplished by the trial court which was the Circuit Court of Jefferson County, Kentucky, Fourth Division, Louisville, Kentucky.

STATEMENT OF GROUNDS FOR INVOKING JURISDICTION

The decree sought to be reviewed was orally announced by the trial court, on October 21, 1982 in open court (App. E) and, though the decree prohibited exercise by Petitioners of constitutional rights claimed here and in the appellate courts below to have been violated, the decree was not reduced to writing except as a part of the transcription of the open court proceedings which is included in the Appendix.

The denial of the constitutional rights accomplished by the open court decree on October 21, 1982 cleared the way for the entry of a summary judgment by the trial court on October 25, 1982 (App. F) which, absent the unanswered proof received by the trial court in violation of the constitutional right which is the subject of this petition, is totally unsupported, i.e., there is no proof of any kind establishing or from which can be derived, directly or by implication through deduction or induction, the facts which form the essence of the summary judgment.

Petitioners sought relief from the here complained of violation by a timely appeal to the Kentucky Court of Appeals. As stated above, the Kentucky Court of Appeals, in a decision included in the above cited opinion, rendered February 24, 1984, chose not to allude to the existence of the issue raised by Petitioners. By a petition to rehear directed to the Kentucky Court of Appeals (App. I), Petitioners again brought the issue in question here to the attention of the Kentucky Court of Appeals, but, again, by order entered June 29, 1984 (App. J), the Kentucky Court of Appeals refused to rehear or in any other way recognize the existence of the violation in question here.

By duly and timely filed motion, Petitioners moved the Kentucky Supreme Court to grant a discretionary review of the action of the Kentucky Court of Appeals and the trial court. (App. K) This motion for discretionary review filed July 18, 1984 with the Kentucky Supreme Court made explicit and specific reference to the question here presented. Without reference to any issue raised or question presented, the Kentucky Supreme Court merely entered a terse order on November 8, 1984 denying Petitioner's motion seeking a discretionary review. (App. L) *Kentucky Rules of Civil Procedure*, Rule 76.20(9)(e) specifically denies a movant for a discretionary review before the Kentucky Supreme Court the right to petition for rehearing of the denial of the motion.

The jurisdiction of this court to review the decree below is provided by Title 28, *United States Code* §1257(3). This petition is for a writ directed to the violation accomplished by the Circuit Court of Jefferson County, Kentucky, Fourth Division on the basis of the authority collected in 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* ¶509.01 n. 16 (2d ed. 1982), but the official record of the proceedings, review of which is being sought by this petition, is presently lodged with the Clerk, Kentucky Court of Appeals, 403 Wapping Street, Frankfort, Kentucky 40601, filed under Court of Appeals Nos. 83-CA-1398-MR and 83-CA-343-MR.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners rely, for the relief here sought, on three separate statements of rights and advantages secured to Petitioners and to have been protected, but which were violated, in the proceedings below.

The first is in the Constitution of the United States, Amendment 14, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state *deprive any person* of life, liberty, or *property without due process of law; nor* deny to any person within its jurisdiction the *equal protection of the laws.* (emphasis added)

The General Assembly of Kentucky, the state legislature, ratified the "Constitutional Judicial Article" to the Constitution of Kentucky in November 1975 to be effective January 1, 1976. This became the Acts Of The General Assembly, Chapter 84 and provides as follows in §116:

> The Supreme Court shall have the *power to prescribe* rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and *rules of practice and procedure* for the Court of Justice. The Supreme Court shall, by rule, govern admission to the Bar and the discipline of members of the Bar. (emphasis added)

In furtherance of the authority granted by §116, the Kentucky Supreme Court prescribed, as follows, *Kentucky Rules of Civil Procedure,* Rule 6.04(2):

> When a motion is supported by affidavit, the affidavit *shall be served with the motion;* and, except as otherwise provided in Rule 59.03, *opposing affidavits may be served not later than one day before the hearing,* unless the court permits them to be served at some other time. (emphasis added)

Finally, Petitioners rely on the following which appears as *Kentucky Rules of Civil Procedure,* Rule 56.03:

> The motion (for summary judgment) shall be served at least 10 days before the time fixed for the hearing. The *adverse party prior to the day of the hearing may serve opposing affidavits.* The judgments sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (emphasis added)

STATEMENT OF THE CASE

The proceedings below were initiated by Respondent filing a, more or less, routine complaint claiming a default on the part of Petitioners in the repayment of various loans evidenced by several purported promissory notes and secured by several purported mortgages. Petitioners answered the complaint in a timely fashion with general denials and supplemented the answer, in a timely fashion, by setting up certain affirmative defenses.

Pre-trial discovery proceeded restricted by a stipulation, converted into court order, that the adversaries would not exchange documents or information relating to events which transpired subsequent to the date which Respondent claimed the default occurred. Consequently, by stipulation enforced by order, the record in this case is devoid of information relating to events occurring subsequent to March 31, 1981. This is a very significant fact not to be later overlooked or taken lightly. (App. A)

Respondent filed a motion for summary judgment but, at the time of filing, did not serve any affidavits in support of the motion for summary judgment. Respondent relied on certain depositions, the later filed affidavit in opposition filed by Petitioners and certain other documents and a stipulation. But, not one word in any of this material addressed the subject of how much money, i.e., the *amount*, Respondent was supposedly due to be paid except as hereinafter specified.

As a result of the motion for summary judgment, Petitioners filed an affidavit of one of the Petitioners as evidence to support the proposition that there existed a genuine issue as to material facts. (App. B) The affidavit filed in opposition included, *inter alia*, the following state-

ments of fact made under oath which may be found in App. B, at ¶8, pp. 2-3:

> Since October 26, 1978, I have had the use of UKB money dispersed (sic) to me under the notes. Because I have not, as yet, had the opportunity to review UKB records and compare them with my own, *it is impossible for me to know precisely at what time I had exactly how much money representing the principal balance of the notes.* Further, it is *impossible for me to know precisely how much money I have paid to UKB under the notes from among all of the exchanges and transactions between UKB and me.* However, I have made an attempt to review the records available to me and to make the best estimate, from those records, I can concerning what monies have been exchanged between UKB and me as a result of the notes. According to the best information presently reviewed by me, not including UKB records, it appears that, fairly soon after October 26, 1978, I received use of $2,100,000.00 of UKB money. Between that time and February 1981, I paid approximately $1,725,000.00 to UKB as a result of the notes. In addition, in March and December 1981, UKB, over my strenuous objection, sold retirement stock pledged by me and my wife as security for the loans. From this, according to the best information I have, UKB realized amount of approximately $560,000.00. This totals $2,285,000.00 thus far paid by me for the use the (sic) UKB's $2,100,000.00 since shortly after October 1978 or for a period just less than four years. In June 1982, judging from the default judgment entered, UKB then claimed entitlement to approximately $2,400,000.00 additional, from me. If the $2,400,000.00 had been paid in June 1982, this would have resulted in a profit to UKB of approximately $2,685,000.00 as a result of my

> use of its $2,100,000.00 for approximately three and one-half years. From the best information available to me, I am lead (sic) to believe that UKB is claiming entitlement to continuing interest at a rate of approximately $1,000.00 per day. Thus, if UKB collected what it claims to be entitled to through August 30, 1982, it would realize a profit of approximately $2,800,000.00 for my use of their $2,100,000.00 since shortly after October 1978. (emphasis added)

Prior to Thursday, October 21, 1982, no evidence had been made of record, agreed on but not made of record or in any other way available for inclusion in the record, stipulation by counsel, or consideration by the court in any other way concerning the *amount* of money which Respondent claimed was due from Petitioners on October 21, 1982. The only evidence of record addressing that subject, prior to October 21, 1982, was the above quoted portions of the affidavit filed by Petitioners.

Because all but one of the purported promissory notes which Respondent claimed by its complaint were defaulted by Petitioners and as to which judgment was entered included provisions for an uncertain rate of interest variable on a daily basis tied to a base rate said to be the "prime rate" of Respondent, it is now, and always has been, absolutely impossible to refer to the face of the purported promissory notes and, thereby, determine the *amount* owed or claimed to be owed. Also, because there were five separate purported notes bearing different rates, for different principal amounts, two of which merely set up lines of credit continually being drawn on and continually being repaid in varying and various amounts less than the face amount of principal and with no consistency from note to note as to the interest rate, i.e., one of the notes had a fixed rate and the other four had variable rates but the variable rate differed from note to note.

Essential to know what was owed, or even claimed to be owed, is, and always has been, (1) the "prime rate" (which may or may not differ from the rate announced by Respondent, at any given time, as Respondent's prime rate) of Respondent each and every day during the relevant time period; (2) the claimed outstanding and unpaid principal balance on each and every day as to each and every note separately considered during the relevant time period; (3) how much of the outstanding and unpaid principal balance had been advanced, and when, under which purported promissory note; (4) how much had been credited, and when, by Respondent, from previous collections, to principal reduction and how much to interest payment as to each note separately considered. Because multi-millions of dollars were involved, seemingly slight differences convert into thousands of dollars.

Much of the dispute between Petitioners and Respondent centered around the defense of Petitioners that Respondent had overcharged interest. This included a defense, the full development of which was pretermitted by the summary judgment, that what Respondent announced as its prime rate, in fact, was a misrepresentation in that the prime rate was a different and lower rate. By stipulation and court decree (App. E, at 49-50), it was resolved that Respondent, *as related to a time period ending March 31, 1981,* could use the announced prime rate as the rate to which the variable interest rate loans to Petitioners was tied. The record included evidence as to what Respondent had announced was its prime rate during the life of the loans up to and including March 31, 1981 *but not beyond that date.* There is absolutely no evidence, direct or implied, of record of any kind in any form as to what Respondent even announced as its prime rate during a period commencing April 1, 1981 and thereafter. Also,

the above referenced stipulation and decree of court had no applicability to any happening, including the imposition of a charge for interest at any rate, which occurred on or after April 1, 1981.

In spite of the state of the record at the opening of business on Thursday, October 21, 1982, the trial court below conducted a previously scheduled open court hearing for the purpose of determining whether to grant Respondent's motion for summary judgment. Remembering that, at that point, the only evidence of record relative to that *amount,* if any, supposedly owed by Petitioners to Respondent was the affidavit of one of the Petitioners, the relevant part of which is quoted above, the following colloquy between court and counsel occurred as is reported by transcript included as App. E at 47, 48, 57, 58:

> MR. FROCKT: We will bring the judgment back over in morning.
>
> MR. PARRISH: Now, as to the affidavits, I assume—
>
> MR. FROCKT: We tendered affidavits as to the calculation of principal and interest, Your Honor, in support of the tendered judgment.
>
> MR. PARRISH: But I assume we have the normal ten days to respond with counter affidavits if we desire.
>
> THE COURT: Oh, gosh. Now, this has been on for summary judgment. We've just delayed the hearing because of that argument over the 101 days, but that doesn't mean you keep getting a ten day extension on the filing of—
>
> * * *

MR. PARRISH: But I haven't had the affidavit with which to file something.

THE COURT: But the point is anybody can file affidavits or counter-affidavits up to the day of the hearing.

MR. PARRISH: I had nothing to counter, that's all I'm saying.

THE COURT: Well, I suppose that's a chance you take when you walk into a hearing a motion for a summary judgment.

Aside from the affidavit filed by Petitioners, quoted in pertinent part above, the only evidence of record in the proceedings below probative of the amount claimed to be owed to Respondent by Petitioners are the two affidavits (App. C, D) filed by Respondent during the course of the open court hearing on that Thursday, October 21, 1982. As evidenced by the above quotation from the transcript of proceedings, in the face of an affirmative request by Petitioners for time within which to file counter-affidavits and statement by counsel for Petitioners that they had not even had the opportunity to read the affidavits, the court pointedly prohibited Petitioners from offering or attempting to offer any explanation for or proof countering that which was accepted by the court through the affidavits filed by Respondent on Thursday, October 21, 1982. Unquestionably, without the proof contained in those affidavits filed by Respondent at the commencement of the hearing on the motion for summary judgment on Thursday, October 21, 1982, the trial court would have been without even a scintilla or an iota of evidence, direct or circumstantial, on which to base a judgment that Petitioners owed a sum certain to Respondent.

On Monday, October 25, 1982, the trial court entered a summary judgment against Petitioners ordering them,

among other things, to pay, as principal and interest, $2,508,560.27, plus interest to accrue thereafter at the rates specified in the judgment, to Respondent. (App. F, at ¶¶1-5, pp. 3-5) This amount included interest which purportedly accrued between March 31, 1981, up to and through October 15, 1982. This represents a nineteen (19) month period as to which, by stipulation enforced by decree of court, there had been no pre-trial discovery.

It is significant that, prior to Thursday, October 21, 1982, by the affidavits tendered to and accepted by the trial court, the record is completely silent as to even a claim by Respondent that it was due the amount which it requested the court to adjudge against Petitioners. In other words, Petitioners were confronted with proof against them for the first time, requested the opportunity to read the proof, to test the proof and to rebut the proof, but the trial court summarily denied the request and entered judgment against Petitioners based on the very proof in question.

Thereafter, Petitioners, on November 24, 19[illegible], took an appeal from the summary judgment. By brief and record citation (App. G), Petitioners brought to the attention of the Kentucky Court of Appeals the error now presented to this court. The Kentucky Court of Appeals, on February 24, 1984, rendered a decision and authored an opinion (App. H) which makes no reference of any kind to the fact that the error had been raised or of facts underlying it. The opinion of the Kentucky Court of Appeals does make an oblique reference stating that the amount owed was determinable by reference to the face of the loan documents. (App. H, p. 3) On March 15, 1984, by a petition to rehear (App. I), Petitioners emphasized to the Kentucky Court of Appeals that reference to the face of the loan documents in no way provided assistance in computing the amount owed. Nevertheless, the Kentucky Court of Appeals denied Petitioners' petition to rehear. (App. J)

Finally, Petitioners made a motion, on July 17, 1984, to the Kentucky Supreme Court seeking a discretionary review of what had occurred below. (App. K) The motion for discretionary review included specific and direct reference to the record and law establishing the error now presented to this court. Nevertheless, the Kentucky Supreme Court, on November 8, 1984, denied Petitioners' motion for discretionary review. (App. L)

ARGUMENT

This court has repeatedly ruled that, when a state enacts or declares a rule of procedure, arbitrary refusal to allow one the advantage of the rule or enactment is a denial of the procedural due process secured by the Constitution of the United States, Amendment 14, §1. *Wolff v. McDonnell,* 418 U.S. 539, 557-558 (1974). As will be discussed further herein, the trial court below, without any explanation or justification, denied Petitioners the explicit unarguable and irrefutable advantages unambiguously enacted in writing in the *Kentucky Rules of Civil Procedure* Rule 6.04(2) and Rule 56.03.

Apart from the arbitrary refusal of the court below to allow Petitioners benefit of the enacted rules of procedure, the failure to allow Petitioners *any* opportunity (because no opportunity was allowed, there is no question as to reasonableness) to review, test and/or answer critical proof against Petitioners was violative of the due process requirements of the United States Constitution, Amendment 14, §1 because it denied Petitioners "a fair opportunity to rebut" proof offered against them [*Valandis v. Kline,* 412 U.S. 441, 446 (1973)] and "an opportunity to meet" the claim by Respondent that a sum certain (that being first announced in the affidavits filed on October 21, 1982) was owed by Petitioners. *Federal Trade Commission v. National Lead Company,* 352 U.S. 419, 427 (1957).

The right to procedural due process is absolute; therefore, the denial of procedural due process is actionable irrespective of actual harm. *Carey v. Piphus*, 435 U.S. 247, 266 (1978). The right to procedural due process includes an opportunity to adduce evidence [*Hovey v. Elliott*, 167 U.S. 409, 414 (1897)], and to have judicial findings based on introduced evidence. *Baltimore & Ohio Railroad Co. v. United States*, 298 U.S. 349, 369 (1936).

Of significance are the words of this court in *Boddie v. Connecticut*, 401 U.S. 371 (1971) at 377-378:

> Prior cases establish, first, that due process requires, at the minimum, . . ., persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. . . . [T]he theme that 'due process of law signifies a right to be heard in one's defense' (citation omitted) has continually recurred in the years since Baldwin, Windsor, and Hovey. (footnote omitted)
>
> Although '[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote (citation omitted) 'there can be no doubt at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case' (citation omitted)
>
> • • •
>
> What the Constitution does require is 'an *opportunity . . . granted at a meaningful time and in a meaningful manner*,' (citation omitted) 'for [a] hearing appropriate to the nature of the case,' (citation omitted). (emphasis added)

Included among rights to be protected by procedural due process is the right to have an appellate review of

factual determinations decisive of vital rights based on crucial facts developed in the trial court. *Price v. Johnston*, 334 U.S. 264, 291 (1947). If the trial court prohibited, in the face of a request by the affected litigant for the only opportunity to do so, to allow such facts to be developed, the right to a meaningful appellate review is denied.

The fact that the violation of one's right to procedural due process under the United States Constitution, Amendment 14, §1 has been accomplished by the construction which a state court gave to a valid state statute makes the violation no less a violation. This court addressed this specifically in *Brinkerhoff-Faris Trust and Savings Company v. Hill*, 281 U.S. 672 (1929) at 680:

> The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (citation omitted) state statute. The federal guarantee of due process extends to state action through its judicial, as well as through its legislative, executive or administrative, branch of government. (footnote omitted)

Even though actual damages need not be shown for a violation of one's procedural due process rights to be actionable, for there to be a violation at all, there must be a deprivation of liberty or property. Thus, even if the deprivation of property accomplished by the violation is not damaging, the violation is actionable.

This court addressed the deprivation of property through judicial edict in *Hovey v. Elliott*, supra, 167 U.S. at 418-419:

> The necessary effect of the judgment of the supreme court of the District of Columbia was to decree that a portion of the award made in favor of the defendant, in other words his property, belonged to complainants in the cause. The decree therefore awarded

> the property of the defendant to the complainants *upon the hypothesis of fact* that by contract the defendant had transferred the right in or to this property to the complainant. If the court had power to do this, *by denying the right to be heard to the defendant*, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law? (emphasis added)

Finally, the fact that the court below might have been hurried and frustrated with the time necessary to accomplish the minimum guarantees of the United States Constitution, Amendment 14, §1 is not availing to excuse the wrong. This was specifically addressed by this court in *Stanley v. Illinois*, 405 U.S. 645 (1972) at 656:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in partcular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

In the instant case, the facts are totally without dispute. *Kentucky Rules of Civil Procedure*, Rule 6.04 (2) and Rule 56.03, as quoted above, hedge in no way in their mandatory requirement that if a motion in general or summary judgment motion in particular are to be supported by affidavit, the affidavit "shall" be served with the motion. Respondent filed a motion for summary judgment without an affidavit with the motion. The same

rules provide that (1) the adverse party may serve opposing affidavits at any time prior to the day of the hearing and (2) that the hearing may not be fixed at a time before *ten days* from the date on which the motion (and, by implication, any affidavits supporting it) shall be served. Therefore, it is impossible to abide by these rules without a party against whom a summary judgment is being sought by motion to have at least *ten days* within which to file an opposing affidavit.

In the instant case, both Rule 6.04(2) and Rule 56.03 were violated when the court accepted the tendered affidavits in support of the motion for summary judgment from the movant, Respondent here, not only after the motion had been served but on the day fixed for the hearing while the hearing was in progress. Neither Rule 6.04(2) nor Rule 56.03 give the court discretion to permit service of affidavits by a movant except as provided in the Rules. This is in contrast to the specific provisions of Rule 6.04(2) which affirmatively empowers the trial court to allow a party opposing a motion for summary judgment additional time within which to file an opposing affidavit. The fact that Rule 6.04(2) and Rule 56.03 were violated by arbitrary action of the trial court is wholly indefensible.

It is also indisputable that, absent the proof which the trial court accepted through the affidavits, it is not simply a question of the sufficiency of the proof then left to support a summary judgment; rather, a situation is presented where there is no proof of any kind, shape, form, or substance to support the award a sum certain to Respondent to be paid by Petitioners as was done by the summary judgment. Respondent may again argue that the amount to be paid by Petitioners was derived by a "simple mathematical" computation. However, two factors belie accuracy of this

oversimplification: (1) the simplicity of a mathematical computation is complicated massively by the quantity of information and various sources from which the various types of information must be derived all of which depends for its accuracy wholly on Respondent not making a mistake or misrepresentation; and (2) the simplicity of the formula avoids the issue because the simplest formula in the world is absolutely impossible to work if the mathematician has no numbers. A two part addition problem is a very simple mathematical computation, but, if the numbers to be added are missing, it is immaterial how simple it would be to add them if available. Also, if numbers to add were selected but those numbers were not the right numbers to add to get the result to be computed, the fact that it was simple to add the numbers selected is an immaterial fact.

Petitioners would challenge Respondent to direct this court to the evidence of record, disregarding the belated affidavits, by which the necessary component numbers are shown. Petitioners candidly state to this court that the challenged task is absolutely and indisputably impossible.

Further, Petitioners are not avoiding the obvious by a technical complaint that that which everyone knows any way simply did not make its way into the record. The defenses of Petitioners centered around the contention by Petitioners that Respondent had overcharged Petitioners by misrepresenting to Petitioners the *amount* owed by Petitioners. Well before October 21, 1982, there was on file an affidavit by one of the Petitioners making oath that it was impossible for Petitioners to determine what was owed without records other than those of Petitioners. The summary judgment included over one-half million ($500,000.00) dollars for interest supposedly accruing between March 31, 1981 and October 15, 1982, as to which

there was not one shred of evidence of record or exchanged by pre-trial discovery because of the ordered discovery cutoff date. Even as it relates to the period preceding April 1, 1981, Petitioners were deprived of the opportunity to test the contentions of Respondent concerning whether what was shown as outstanding unpaid principal was accurately stated and whether what was otherwise shown by the records of Respondent was accurately recorded and represented. As revealed by the relevant part of the transcription of the proceedings on October 21, 1982, the trial court was advised by counsel for Petitioners that the affidavits accepted by the court on that day from Respondent had not even been read by Petitioners because the belatedness of the service had, to that point, made it impossible.

Petitioners specifically requested opportunity to file counter affidavits and asked the trial court, during the hearing on October 21, 1982, and immediately upon receiving copies of the affidavits accepted by the trial court that day, for the normal ten day period allotted by the rules (i.e., Rule 56.03) within which to file. While the written transcript cannot convey to this court clearly the tone and demeanor of the trial court in response, the choice of words by the trial court and the comments of the court in explanation should be instructive as to the reasoning employed by the trial court. When Petitioners advised the trial court that it was impossible for Petitioners to anticipate service of the affidavits (an impossibility confirmed by Rules 6.04(2) and 56.03) or to respond to the affidavits which they had not even had an opportunity to read, the trial court merely retorted: "Well, I suppose that is a chance you take when you walk into a hearing a (sic) motion for a summary judgment." (App. E at 58)

In response to the categorization by Petitioners that Petitioners were entitled to a "normal" ten day period within which to file opposing affidavits (App. E at 47), the trial court stated at follows in App. E at 57:

> THE COURT: Can we clear up a misconception. You don't have ten days from the day of the hearing. The reverse is true. The rule is (sic) Kentucky is that the hearing can't be set quicker, the hearing on the motion can't be set any quicker than ten days from the time of the making of the motion to give you that ten days but my golly this thing has been on my docket for not ten days but more like ten months it seems—

The trial court, plainly and simply, made an error (see p. 11 lines 3-5 above), sincere though it may have been, in the interpretation or application of the prevailing law in Kentucky. The sincerity of the trial in its belief concerning the prevailing law is immaterial. The ruling remains arbitrary and, whether arbitrary or not, denied Petitioners the right to due process. The Kentucky Court of Appeals and the Kentucky Supreme Court refused to even recognize the existence of the error, much less, make an attempt to correct it. Neither did any of the courts of Kentucky attempt to dismiss the existence of the error as harmless since to have done so would have made a mockery of the harmless error rule.

Yet, at the October 21, 1982 hearing, Petitioners pleaded with the court in an effort to obtain an opportunity to file opposing affidavits. Had this opportunity been granted, it is possible that the violation of the procedural due process rights of Petitioners could have been avoided. However, the court adamantly refused to allow

the time necessary to correct the error by the following language in App. E at 48:

> THE COURT: Today is the cutoff today. (sic) . . .

Continuing in App. E at 55-56:

> MR. PARISH (sic): Well, so the record is also clear *as far as the affidavits* that have been submitted to the Court to support the final judgment and order of sale. I saw—. . . about an hour before the hearing and I had no prior knowledge that there was going to be submitted and (sic) some of the facts that are stated in there I really don't think the record substantiates. . . . [T]*he affidavits I was given at the beginning of this hearing and* I really have *not had* an *opportunity to read* them, but as I understand *Your Honor's ruling,* and that's all I'm trying to do, is be sure I understand, Your Honor, is accepting the affidavits and accepting the factual predicates necessary to support the changes or the final order and judgment as you have dictated it to be today *without us having opportunity to take issue with that.* I understand the local rules are that *I* have *ten days* to submit the counter affidavits. That's all right if I don't. I just *want to be sure* that *I'm being prohibited counter affidavits.* (emphasis added)

Finally continuing in App. E at 58-59:

> THE COURT: I'm even missing the argument because today it was passed only for one purpose and that was because at the last hearing the Defendant raised the contention that there was still some argument over these 101 loans . . . [B]ut *it* really *was passed to today not for a lot of* more extensive hearings or

> *proof* or anything *other than* narrowed down to where do we stand on *the 101 loans, that was the only* remaining *issue* as far as I could see.
>
> And so you've brought in now a stipulation which answers the issue over the 101 loans and *I feel like it's time to wind up the lawsuit.* (emphasis added)

Thus, the trial court deliberately acted full well knowing that Petitioners were being denied right to rebut *proof introduced for the first time* to support an allegation of fact for the first time being made against Petitioners. In effect, Petitioners were forced to accept exactly and precisely what Respondent said was fact, by affidavit not subject to cross examination, and denied even the most rudimentary and fundamental opportunity to test the allegation in contention which had its genesis and ending entirely in Respondent. As far as this most important part of the proceeding, it was effectually *ex parte.*

As far as addressing the subject by proof prior to the October 21, 1982 hearing, Petitioners had nothing to rebut, because Respondent had not anywhere at any time or by any other way, offered proof against Petitioners as to how much money it was that Respondent was claiming was due. Petitioners had done all they could do by making oath in a timely filed affidavit of record that they did not know and had no means on their own to determine how much, if any, was owed by them to Respondent.

Quite literally, it would be impossible to even hypothesize a more blatant and indisputable violation of fundamental due process than has occurred in the instant case.

In conclusion, Petitioners respectfully submit that, if this court determined that granting the petition for certiorari was not justifiable, this is an appropriate case, under

United States Supreme Court Rules, Rule 23.1, for summary disposition.

Respectfully submitted,

PARRISH & MULROONEY, P.C.
LARRY E. PARRISH, ESQ.
Twenty-first Floor
First Tennessee Building
165 Madison Avenue
Memphis, Tennessee 38103
(901) 526-7777
Attorney for Petitioners

APPENDIX

APPENDIX A

(Filed August 30, 1982)

NO. 81 CI 09925

JEFFERSON CIRCUIT COURT
DIVISION FOUR (4)

UNITED KENTUCKY BANK (formerly doing business as Louisville Trust Bank)

PLAINTIFF

vs.

KENNETH R. GEORGE, et al

DEFENDANTS

Proceedings: Hearing

Heard before His Honor Richard A. Revell sitting without a Jury, August 16, 1982, Louisville, Kentucky

APPEARANCES

FOR THE PLAINTIFF:

Richard Frockt
Kentucky Home Life Building
Louisville, Kentucky 40202

FOR THE DEFENDANT:

Theodore H. Amshoff
1445 Starks Building
Louisville, Kentucky 40202

John J. Mulrooney
Larry E. Parrish
Parrish & Mulrooney
2125 First Tennessee Building
Memphis, Tennessee 38103

Scott T. Wendelsdorf
730 W. Main
Louisville, Kentucky 40202

MARLENE UNDERWOOD
REPORTER

(AUGUST 16, 1982)

MR. AMSHOFF: Several motions here—Mr. Larry Parrish from Memphis has come over and his partner is here today.

THE COURT: Okay. Let's take a look at the Motions and see what we can do.

MR. FROCKT: Your Honor, there is two motions for the United Kentucky Bank from that standpoint, too.

THE COURT: Okay.

MR. FROCKT: —Motions for Protective Orders. There is a Response that was filed, I presume, today or even Friday. It was mailed to us, but was received over the weekend, your Honor. On that it brought up another

issue. Mr. Wendelsdorf is here for, I think a more minor, more limited issue I think maybe it would be best for his time to go ahead and argue that first.

* * *

We have filed a written objection to the Discovery pursuant to the Rule but in addition to that * * *

* * *

[12] MR. FROCKT: That would be without any problem, Your Honor. As long as we're allowed to either protect that record because that's a competitive record, don't forget. The banking practice in Louisville is of a competitive nature and banks go out and solicit and price these loans on a daily basis, your Honor. We're willing to give it—

THE COURT: But this is after the fact. I mean you can't go back and—interest rates change daily.

MR. FROCKT: I understand that. *As long as it's limited to the time of default, which is what we're saying that it should be limited to.* I have no problems producing all of those records. That's fine. (emphasis added)

MR. PARRISH: Now limited to time of default, I'm not certain what—

THE COURT: Well, back how far?

MR. FROCKT: A demand letter on a default was issued in March of 1981, your Honor. And we are saying—

THE COURT: Okay. But didn't we round this off to the last quarter of '80 and the first quarter of '81?

MR. FROCKT: That's it. [13] March of 1981, Your Honor.

THE COURT: Okay. So October, November and December of '80 and January, February and March of 1981.

MR. FROCKT: I'm even willing to go back and provide that record, if we have it, for a period during the time of the loan because that's a quarterly record.

MR. PARRISH: No objection.

THE COURT: Okay.

MR. PARRISH: Well, I think it is quarterly but in order for us to have the computations we need we need it from the point which the loan was made.

THE COURT: All right. Okay.

MR. PARRISH: Because it's the interest rate on—

THE COURT: He's not disagreeing with you so—We had, *at a hearing you weren't at*, I think *we* had *narrowed something down to the last quarter of '80 and the first quarter of '81*. (emphasis added)

MR. AMSHOFF: Those were the records that Mr. George—Those were the income tax records and the ledger—

[14] THE COURT: Well, *I was trying to be consistent, do it the same way on these records* but if the bank is willing to provide those records on back to the date of the inception of the loan, fine. That's all right. (emphasis added)

MR. PARRISH: I have found that those are the easiest documents to work with for both sides and the easiest to produce and the easiest to produce the information that we need. And that's fine.

THE COURT: Okay.

MR. FROCKT: That was not the alternative, your Honor, and I don't want—there's no reason to belabor the point, if that's what they need to accomplish the rate information that makes it quite a bit easier on us and we will be more than happy to provide it.

MR. AMSHOFF: This—

THE COURT: That's how the bank keeps those records.

MR. FROCKT: The other problem, your Honor, which we haven't gotten into if those records aren't kept that way, we're talking of just about every record that's kept in the Personal Loan Department.

THE COURT: Well, it's going

CERTIFICATE

I, MARLENE UNDERWOOD, Official Court Reporter for the Jefferson Circuit Court, do hereby certify that the foregoing pages represent a full, true, and complete transcript of the proceedings had in the case of United Kentucky Bank vs. Kenneth R. George, et al, had at the time and place set forth in the caption herein.

Given under my hand as Court Reporter this 27th day of August, 1982.

.....

OFFICIAL COURT REPORTER

APPENDIX B

(Filed September 10, 1982)

NO. 81CI-09925

JEFFERSON CIRCUIT COURT
FOURTH DIVISION

UNITED KENTUCKY BANK (formerly
d/b/a LOUISVILLE TRUST BANK)
PLAINTIFF/COUNTERDEFENDANT

v.

KENNETH R. GEORGE, ET AL
DEFENDANTS/COUNTERPLAINTIFFS

AFFIDAVIT OF KENNETH R. GEORGE

Comes now affiant, Kenneth R. George, defendant/counterclaimant in the instant case, and states as follows:

1. I am over eighteen (18) years of age, am fully competent to act on my own behalf and have first-hand knowledge, to the degree stated, of all matters herein stated by me and am relying on my present best recollection to make the following statement.

2. I am the maker of the promissory notes (hereinafter "the notes") which are the subject of the lawsuit above styled.

3. Through January 1981, I timely paid what United Kentucky Bank (hereinafter "UKB") claimed was owed by me under the notes.

4. On February 12, 1981, I advised the appropriate employees of UKB that I would refuse to make further payments under any of the notes until

UKB took definitive action to correct overcharges under the notes about which I had continually advised UKB and protested for approximately fourteen (14) months.

5. Other than one payment of approximately two thousand ($2,000.00) dollars made in 1981, not because of liability but for the purpose of attempting to better my bargaining position, and seventy-one thousand ($71,000.00) dollars to obtain eleven lot releases in keeping the nine and three-fourths (9.75%) percent flat rate loan current until UKB filed disclosure, I have made no further payments under the notes, and UKB has taken no steps toward correcting the overcharge situation.

6. Prior to making the notes, I was assurred (sic) by UKB that, though I agreed to pay interest calculated by a variable rate tied to prime, if the UKB prime rate ever exceeded twelve (12%) percent, my rate would be capped. At the time the UKB prime rate was claimed by UKB to exceed twelve (12%) percent, I complained that I was being overcharged in relation to what I had agreed to pay as interest. For the succeeding fourteen (14) months, I constantly complained and took every means I knew at my disposal to convince UKB to perform according to its promise to me and cap my interest rate. During that fourteen (14) month period, the interest rate which UKB claimed to be its prime climbed steadily to twenty-one (21%) percent. Even though complaining and doing all I knew to do to obtain relief during the fourteen (14) month period, I paid what UKB claimed was due. Finally, in February 1981, exasperated by the refusal of UKB to recognize or perform in

accordance with its promise to me, I ceased making further payments as demanded by UKB and notified them of my intentions. I initially took such action hoping thereby to gain recognition by UKB of the fact that they could no longer ignore the requirements of their promise.

7. After I ceased making payments under the notes in February 1981, UKB, over specific instructions by me not to do so, sold common stock pledged by me as security for the notes. This common stock was stock which I had accumulated over the years in a planned effort to provide retirement income. I vociferously objected to this action by UKB and was told, in response, that the action had been taken in order to "get my attention." From that point forward, I lost confidence that UKB had ever dealt in good faith. I then undertook to reexamine the totality of my relationship with UKB using every source at my disposal to determine if I had been victimized by UKB in other ways previously unknown to me. Prior to that time, I chose to believe that the refusal of UKB to recognize their obligation in relation to capping my interest rate, no matter how serious, had been the result of a mistake, oversight or error. After that time I determined in my own mind that their action had been deliberate and pre-planned.

8. Since October 26, 1978, I have had the use of UKB money dispersed (sic) to me under the notes. Because I have not, as yet, had the opportunity to review UKB records and compare them with my own, it is impossible for me to know precisely at what time I had exactly how much money

representing the principle balance of the notes. Further, it is impossible for me to know precisely how much money I have paid to UKB under the notes from among all of the exchanges and transactions between UKB and me. However, I have made an attempt to review the records available to me and to make the best estimate, from those records, I can concerning what monies have been exchanged between UKB and me as a result of the notes. According to the best information presently reviewed by me, not including UKB records, it appears that, fairly soon after October 26, 1978, I received use of $2,100,000.00 of UKB money. Between that time and February 1981, I paid approximately $1,725,000.00 to UKB as a result of the notes. In addition, in March and December 1981, UKB, over my strenuous objection, sold retirement stock pledged by me and my wife as security for the loans. From this, according to the best information I have, UKB realized amounts of approximately $560,000.00. This totals $2,285,000.00 thus far paid by me for the use the (sic) UKB's $2,100,000.00 since shortly after October 1978 or for a period just less than four years. In June 1982, judging from the default judgment entered, UKB then claimed entitlement to approximately $2,400,000.00 additional, from me. If the $2,400,000.00 had been paid in June 1982, this would have resulted in a profit to UKB of approximately $2,685,000.00 as a result of my use of its $2,100,000.00 for approximately three and one-half years. From the best information available to me, I am lead to believe that UKB is claiming entitlement to continuing interest at a rate of

approximately $1,000.00 per day. Thus, if UKB collected what it claims to be entitled to through August 30, 1982, it would realize a profit of approximately $2,800,000.00 for my use of their $2,100,000.00 since shortly after October 1978.

9. After having attended Georgia Tech and spending a few years as an employee of United States Corp of Engineers, I went in business in a small way as a residential builder in Louisville in the mid-1950's. I started by building one or two houses at a time. From that base, I continued to expand my activities and become, in addition to a builder, a residential subdivision developer with some other commercial building from time to time. Over the years, up through 1980, I have built approximately 900 residences in Louisville among other structures. The business has, prior to 1981, continued to expand and has been financially successful.

10. During my years in business, or before for that matter, I have never filed or had filed against me bankruptcy proceedings. More than that, I have never been involved in suits between myself and creditors. Since I have been in business, I have borrowed or been the guarantor on millions of dollars in borrowings and, in the normal course of business, have been indebted to suppliers and others for services rendered but never remember a suit with a creditor over any amount, large or small, until the present difference with UKB.

11. At the point when I ceased making payments to UKB, in February 1981, I was solvent and had assets and resources adequate to pay the full amount of principle and interest which UKB then

claimed was due under the notes. Further, I was not dependent on the income from the subdivision development for the necessary funds with which to pay UKB and did not require loans to obtain the money to pay UKB. UKB offered to loan me the money necessary to pay to UKB everything UKB then claimed it was owed under the notes, but UKB refused to recognize that it had overcharged me.

12. In 1976 and 1977, I conceived a plan to develop a residential subdivision and accessory buildings. After I decided on the exact location and made preliminary estimates as to the possible costs involved in implementing the plan, I took other preliminary measures. Critical to whether the plan was feasible was the availability of borrowed funds with which to complete the project. The cost of those funds was perhaps the single most important factor to my decision to proceed or not proceed. Therefore, after the initial study on my part, I commenced calling on my account officer at UKB sharing ideas and getting feedback. This included site inspections and other preliminary reviews. In this context, I was told that money would be available to me on loan from UKB when I needed it. I discussed in detail with my account officer the cost or possible cost of funds. I told him the maximum I felt I could pay for funds for the project and expressed my concern about signing a variable rate note for a long-term project and the possibility of anticipated costs of funds becoming prohibitive. At that time, I was told by my account officer that it would be unreasonable for me to anticipate that the UKB

prime rate would exceed (12%) percent and that I could proceed on the assumption that funds would be available when needed from UKB on that basis. Since my interest rate was tied to prime by a fixed differential, this gave me definite information on which to act. Based on these assurances, I purchased an option on the land and started work on the subdivision under an agreement with the land owner. In May 1978, the time came when I needed the funds which I had been assured would be available at UKB. At that point, I had been assigned a new account officer and with him, Mr. Gatterdam, I negotiated the terms of the loans now represented by the notes. Mr. Gatterdam made the same assurances about UKB protecting me from an interest rate tied to a prime in excess of twelve (12%) percent. With those assurances restated, I made the note which commenced the funding. In October 1978, the loan originally negotiated in May 1978 was restructured into three notes. If I had had the slightest suspicion that I would ever be called upon to pay interest on loans necessary to complete the subdivision project at a rate higher than thirteen and one-half (13 1/2%) percent, I would never have proceeded with the plan. The assurances made by UKB concerning the interest rate cap was the critical factor in my decision to proceed.

13. All of the notes which I have signed at UKB have been on preprinted forms supplied by UKB to which I affixed my signature after UKB filled in blanks.

14. Over the years in which I have been in business in Louisville, I have dealt extensively with almost all of the savings and loans institutions and with four banks, including UKB. My dealings with the savings and loans have involved the financing of residences and apartment complexes which I have built from time to time. The reason I have had such extensive dealings with many different savings and loans is the practice which I have followed in shopping interest rates. Even when interest rates were stable, I made it a practice to dicker, compare and bargain to obtain the lowest interest rate possible. I placed loans intentionally at several different lending institutions at the same time with the interest rate being the controlling factor.

15. My dealings with banks have involved subdivision development primarily. There again, I remained in close contact with interest rates at competing institutions. I tried to deal with one bank primarily. The reason I ceased doing business at the Bank of Louisville is beacuse my account officer became irritated that I shopped rates. On one occasion, I reminded him that I felt the Bank of Louisville's rates were not the lowest rates available. The loan officer's reaction was anger and a demand that I pay all of my borrowings within thirty (30) days and not have further dealings with the Bank of Louisville. This occurred in 1970 and caused me to act on the recommendation of a friend to establish a banking relationship with UKB. From 1970 up to approximately 1980, my relationship with UKB could not have been more favorable. I was extremely loyal

and satisfied. The trust I placed in UKB was unparalleled in my other business dealings.

16. Early in my business career, I became familiar and conversant with the term "prime rate." I used it repeatedly and continuously in my relationship with lending institutions. It was a term which was so commonly used and so central to my banking relationships that it was used with no more thought or hesitation than use of the most common and basic words and phrases. By 1970, I had no doubt about the definition of "prime rate." It was used by me and, to my knowledge, by everyone with whom I communicated by use of such terminology to mean the absolute lowest rate of interest which the institution in question at the time extended credit to business borrowers. Until June 1981, nothing had ever happened in my experience and no information ever crossed my mind to indicate that anyone had any different or modified definition for the term.

17. As for the meaning of the term "per annum," I derived my understanding of its definition through use of the English language and its usage primarily in the context including the description of the period of time for which stated rates of interest would be charged for the use of borrowed money. Until I asked Helen Hamilton, the note teller at UKB, to assist me in reconciling the difference in my calculations and those of UKB relative to the amount of interest I was asked to pay through billings, I had no idea that "per annum" meant less than a year when used by anyone for any purpose. When I inquired of Helen Hamilton, long after October 1978, as related

above, she explained to me that I was arriving at an amount of interest due less than the amount which UKB claimed was due because I was assuming that a year was made up of 365 days and the bank operated on the assumption that "per annum" made reference to a period of time which included only 360 days. At that time, I complained to Mrs. Hamilton that this, too, constituted an overcharge. Her response to that complaint was to refer me to Jack Colvin who had been my account officer at UKB before Mr. Gatterdam. I discussed the matter with Jack Colvin who merely informed me that this was a common practice in banking. At the time I signed the notes, I intended to obligate myself to pay to UKB accrued interest on a quarterly basis calculated so as to yield the amount which would be payable after a year if the principle balance at the end of a quarter were to remain outstanding for a year divided by the actual number of days I had, up to that time, had use of the borrowed money. It never crossed my mind that UKB nor any other person proceeded on the assumption that a year had less than 365 days.

18. With the same caveats included in paragraph 8 above, my best effort to calculate the amount of interest thus far paid by me in excess of what I would have paid if UKB had calculated my interest assuming a year rather than a 360-day period, yields an estimate between $22,000.00 and $27,000.00.

19. I repeatedly requested UKB to recalculate my interest using a year rather than a period of 360 days as the basis for computation. UKB refused.

20. In June 1981, I read a newspaper article in the Louisville newspapers reporting that a commercial borrower from UKB had sued UKB on the premise that UKB had tied his prime-plus loan to a rate which was higher than the UKB prime rate. This is the first time I had ever heard of such a thing. It had never before occurred to me that UKB would or may have misrepresented to me what their prime rate was. However, with the information which was reported in the newspaper, I commenced further inquiry to learn that documents revealed during the trial about which the newspaper reported revealed that, during the period when my loans at UKB were outstanding, UKB had extended credit to other commercial borrowers at rates less than what UKB had reported its prime to be. The newspaper report and information I subsequently received informed me that UKB had been found liable to the borrower. I then knew that if liability existed in that case, I had been similarly victimized.

21. During the entire period I have been a borrower at UKB, I have never had access to any information as to what the lowest rate of interest at which UKB extended credit to business borrowers on short term loans other than what UKB told me on request or what appeared on the statements which I received from UKB notifying me of the amount they claimed was owed and advising me to pay same. Until after June 1981, I never questioned that the amount which they advised me was, in fact, their prime. I vested total and unquestioned confidence in UKB to advise me accurately in this regard.

22. Prior to August 26, 1982, the date I was advised of its existence, I had no knowledge that there existed an article entitled "I Can Get It For You Wholesale" printed in the May 1, 1977 *Forbes Magazine*. Further, I had no knowledge of the information which was reported therein.

23. Based on remarks made by counsel for UKB in open court in my presence and on my own approximations, UKB has charged and claimed entitlement from me interest at the rate of approximately $1,000.00 per day since I signed the notes.

Further deponent sayeth not.

/s/ Kenneth R. George
KENNETH R. GEORGE

STATE OF KENTUCKY
COUNTY OF JEFFERSON

Sworn to and subscribed before me this 7th day of September 1982.

/s/ Theodore H. Amshoff, Jr.
Notary Public

My commission expires: 5/25/1985.

APPENDIX C

(Filed October 21, 1982)

NO. 81CI-09925

JEFFERSON CIRCUIT COURT
DIVISION FOUR (4)

UNITED KENTUCKY BANK (formerly doing business as the Louisville Trust Bank)

PLAINTIFF

v.

KENNETH R. GEORGE, ET AL.

DEFENDANT

AFFIDAVIT

The affiant, Helen Hamilton, after being first duly sworn, states as follows:

1. That I am the Assistant Treasurer for United Kentucky Bank, Inc., plaintiff in the above-referenced action.

2. That I have computed and verified the amounts of principal and interest accrued and owing on promissory notes of Kenneth R. George, Alberta W. George and Yorktown Lumber.

3. That the following represents an accurate statement of principal and interest accrued and owing on said notes as of October 15, 1982:

Promissory Note	Date of Note	Principal Amount Owing 10/15/82	Accured Interest as of 10/15/82	Rate (Prime)
0132513474 No. 59	10/26/78	723,791.69	143,961.07	+ 1/2%
0132513474 No. 67	10/26/78	1,158,268.92	242,236.90	+ 1 1/2%
0198991440 No. 26	6/04/79	150,000.00	30,419.16	+ 1%
0198991440 No. 91	11/24/80	50,000.00	9,822.63	+ 1/2%
0132480922 No. 67	11/24/80	50,000.00	9,822.63	+ 1/2%
Totals		2,132,060.61	436,262.39	

4. That the total payoff of principal and interest on the above notes equals $2,568,323.00 as of October 15, 1982.

5. That the per diem interest charges on the above notes, based upon United Kentucky Bank, Inc.'s current prime rate of 12%, equals $763.93.

Affiant further sayeth not.

/s/ Helen Hamilton
Helen Hamilton

STATE OF KENTUCKY)
) SS
COUNTY OF JEFFERSON)

SUBSCRIBED AND SWORN to before me this 20th day of October, 1982 by Helen Hamilton.

My Commission expires: (Illegible)

/s/ Betty C. Peters

NOTARY PUBLIC, State at Large, Kentucky

APPENDIX D

(Filed October 21, 1982)

NO. 81CI-09925

JEFFERSON CIRCUIT COURT
DIVISION FOUR (4)

UNITED KENTUCKY BANK, INC. (formerly d/b/a Louisville Trust Bank)
PLAINTIFF

v.

KENNETH R. GEORGE, ET AL.
DEFENDANTS

AFFIDAVIT

Affiant, Fred T. Horneffer, after being first duly sworn, states as follows:

1. That I am the Vice President for United Kentucky Mortgage, Inc., a mortgage loan subsidiary company for United Kentucky, Bank, Inc., plaintiff in the above-referenced action.

2. That I have caused to be computed and verified the amounts of principal and interest accrued and owing on promissory note No. 3120, dated October 26, 1978, in the original principal amount of $250,000, which note was executed and delivered to United Kentucky Bank, Inc., by Kenneth R. George and Alberta W. George, defendants herein.

3. That the following represents an accurate statement of principal and interest accrued and owing on said note as of October 15, 1982:

Promissory Note	Date Of Note	Principal Amount Owing 10/15/82	Accrued Interest 10/15/82	Rate
No. 3120	10/26/78	$223,484.09	$ 19,369.60	9-3/4%

4. That the total payoff of principal and interest on the above note equals $242,853.69 as of October 15, 1982.

5. That the per diem interest charge on the above noted, based upon a 9-3/4% annual rate, equals $59.69.

Further affiant sayeth naught.

/s/ Fred T. Horneffer
FRED T. HORNEFFER

STATE OF KENTUCKY)
) SS:
COUNTY OF JEFFERSON)

Subscribed and sworn to before me, a notary public, by Fred T. Horneffer on this 21th day of October, 1982.

My Commission expires: October 9, 1984.

/s/ Sharon Lee Florence
NOTARY PUBLIC, State-at-Large, Kentucky

APPENDIX E

(Filed January 4, 1983)

NO. 81 CI 09925

JEFFERSON CIRCUIT COURT
DIVISION FOUR

UNITED KENTUCKY BANK
PLAINTIFF

vs.

KENNETH R. GEORGE
DEFENDANT

TRANSCRIPT OF PROCEEDINGS

HEARD BEFORE HIS HONOR RICHARD A. REVELL, JUDGE
OCTOBER 21ST, 1982
LOUISVILLE, KENTUCKY

APPEARANCES

FOR THE PLAINTIFF:

MR. RICHARD FROCKT
THURMAN L. SISNEY
The Fifth Avenue Building
444 S. 5th Street
Louisville, Kentucky 40202

FOR THE DEFENDANT:

LARRY E. PARRISH
2125 First Time Building
Memphis, Tennessee

THEODORE AMSHOFF, JR.
Starks Building
Louisville, Kentucky 40202

REPORTED BY:
MARLENE UNDERWOOD

[2] HEARING BEFORE THE COURT—
OCTOBER 21, 1982

THE COURT: United Kentucky Bank against Ken George; is that right?

MR. PARRISH: Yes, sir.

THE COURT: Where do we stand today?

MR. PARRISH: If we could start up where we left off before.

This date was set for us to come back in here but we had about a 30 minute or so session at the end last time toward settlement, good faith efforts toward settlement between then and the time that we came back.

THE COURT: Okay.

MR. PARRISH: If I remember your last words were that you hoped when we got back here we would be reporting that progress had been made toward settlement or that it had been settled.

So, I feel that we owe Your Honor an explanation as to what has occured since that time.

This past—Well, as * * *

* * *

[47] MR. FROCKT: We will bring the judgment back over in the morning.

Mr. PARRISH: Now, as to the affidavits, I assume—

Mr. FROCKT: We tendered affidavits as to the calculation of principal and interest, Your Honor, in support of the tendered judgment.

MR. PARRISH: But I assume we have the normal ten days to respond with counter affidavits if we desire.

THE COURT: Oh, gosh. Now, this thing has been on for summary judgment. We've just delayed the hearing because of that argument over the 101 days, but that doesn't mean you keep getting a ten day extension on the filing of—

* * *

[48] MR. FROCKT: Okay. And we're to come back here and—

THE COURT: Today is the cut off today. Today—the case was passed only to see if there was any need to take any additional proof. Usually we wouldn't even take proof on a summary judgment. As I said at the last hearing I was sticking my neck out, but I didn't know any other way to get it, get to the heart of the problem and that is simply because you [49] all were saying there is some issue over these 101 loans. Now it turns out that you stipulated so you have removed the last element in the Court's mind of where any factual dispute may lie. So I'm saying well, if—the way I read this stipulation—if that's the way the bank handled it I can't see that they've done anything wrong in the way they treated Mr. George. They have treated him in the same category as with others; except those that were in a preferred classification as you all have lineated here and spelled out in the stipulation and he doesn't fit into any of those categories so they've treated him as other commercial customers.

MR. FROCKT: Your Honor, I will tender a judgment based upon what you have stated.

THE COURT: Well, I think the judgment should make an adjudication to that extent that the Court makes a finding that the bank was not arbitrary in its calculation of prime interest rate. That it had a formula that [50] it followed, that being the four out of the eight bankers from

New York that it set as a category and when four of them shifted the United Kentucky Bank shifted also and that Mr. Ken George, the Defendant, was not treated differently than other defendants in his category who were on a fluctuating prime rate loan—words to that extent. Those findings ought to be made. There ought to be—

MR. FROCKT: That's made in a stipulation, Your Honor, and that would be—that's part of the stipulation.

THE COURT: That's true, that is in the record already in the stipulation, yes, you're right. But in any event those are the adjudications . . .

* * *

[55] MR. PARRISH: Well, so the record is also clear as far as the affidavits that have been submitted to the Court to support the final judgment and [56] order of sale, I saw—the final judgment and order of sale was given to me about an hour before the hearing and I had no prior knowledge that that was going to be submitted and some of the facts that are stated in there I really don't think anything in the record substantiates. He may think it does and the record, I suppose, will stand for itself. The affidavits I was given at the beginning of this hearing and I really have not even had an opportunity to read them, but as I understand Your Honor's ruling, and that's all I'm trying to do, is be sure I understand, Your Honor is accepting the affidavits and accepting the factual predicates necessary to support the changes or the final order and judgment as you have dictated it to be today without us having the opportunity to take issue with that. I understand the local rules are that I have ten days to submit counter affidavits. That's all right if I don't. I just want to be sure that I am being prohibited by the Court from submitting counter affidavits.

[57] MR. FROCKT: Your Honor, let me respond very quickly. The new tendered in persona judgment is only an update of what was tendered some 95 or 120 days ago with our original motions. We tried to bring forth from—

THE COURT: Can we clear up a misconception. You don't have ten days from the day of the hearing. The reverse is true. The rule in Kentucky is is that the hearing can't be set any quicker, the hearing on the motion can't be set any quicker than ten days from the time of the motion to give you that ten days but my golly this thing has been on my docket for not ten days but more like ten months it seems—

MR. PARRISH: But I haven't had the affidavit with which to file something.

THE COURT: But the point is anybody can file affidavits or counteraffidavits up to the day of the hearing.

MR. PARRISH: I had [58] nothing to counter, that's all I'm saying.

THE COURT: Well, I suppose that's a chance you take when you walk into a hearing a motion for a summary judgment.

MR. FROCKT: Your Honor, you set this as a hearing date today.

THE COURT: This really—

MR. FROCKT: Mr. Parrish wants to cross-examine somebody—I'll bring somebody over here and put them in the box.

MR. PARRISH: Why do I—

MR. FROCKT: This is just every time we come up here we have some reason why it has to be delayed. We

found out part of what that reason was. They have hidden five million dollars. And on behalf of the bank I'm insulted that we're now sitting here and trying to delay and delay and delay.

THE COURT: I'm even missing the argument because today it was passed only for one purpose and that was because at the last hearing the Defendant [59] raised the contention that there was still some argument over these 101 loans and the argument was made back to you that you had had sufficient time and you said no you hadn't had sufficient time and I accepted your argument because of the busy schedules of both of you, you had crossed along the way and hadn't gotten to really sit down and go over it thoroughly and I said take one more look at it. But it really was passed to today not for a lot of more extensive hearings or more proof or anything other than narrowed down to where do we stand on the 101 loans, that was the only remaining issue as far as I could see.

And so you've brought in now a stipulation which answers the issue over the 101 loans and I feel like it's time to wind up the lawsuit.

MR. FROCKT: If Mr. Parrish would be satisfied I will detail only the amount of principal that is now due and leave the interest to later calculations if he wants to calculate it that way.

THE COURT: Well, in [60] any event I'm going to have to refer the judgment to the Commissioner to check the description or descriptions as the case may be and the various calculations that the Commissioner makes for the Court so it still won't be signed as of tomorrow.

MR. FROCKT: I would like to tender for the Court's—

THE COURT: That's why there ought to be a separate order granting the summary judgment to the Plaintiff on all issues except Tract A and the calculation. That way the Commissioner won't think well, does he have to hear the whole suit all over again, the determination has been made. It's just a matter of—

MR. FROCKT: Your Honor, I would like to tender two different orders. A judgment and then an order of sale in persona. That way we—

THE COURT: The judgment should be a final judgment and order of sale, but there should be a separate preceding order granting summary judgment which removes the issues in other words.

* * *

[71] CERTIFICATE

I, MARLENE UNDERWOOD, Official Reporter for the Jefferson Circuit Court, Division Four, do hereby certify that the foregoing TRANSCRIPT OF PROCEEDINGS was taken before me at the time and place as stated in the caption; that the witnesses were first duly sworn to tell the truth; the whole truth; and nothing but the truth; that the said proceedings were taken down by me in stenograph and afterwards transcribed under my direction; that it is a true, complete and correct transcript of the said proceedings so had; that the appearances were as stated in the caption.

WITNESS MY SIGNATURE this the 3rd day of January 1983.

/s/ Marlene Underwood
MARLENE UNDERWOOD
Official Reporter
Jefferson Circuit Court
Division Four

APPENDIX F

(Filed October 25, 1982)

NO. 81 CI-09925

JEFFERSON CIRCUIT COURT
FOURTH DIVISION

UNITED KENTUCKY BANK, INC.
(formerly doing business as
Louisville Trust Bank)
PLAINTIFFS

v.

KENNETH R. GEORGE, ET AL.
DEFENDANTS

SUMMARY JUDGMENT

The motion of the plaintiff, United Kentucky Bank, Inc., having been made for summary judgment pursuant to CR 56, and it appearing that there are no material issues of fact, the Court finds that:

1. (a) The plaintiff, United Kentucky Bank, Inc., calculated interest on the loans for the defendants on a 360 day basis. The Court is of the opinion that this traditional practice is not acceptable with the use of modern computer technology and, therefore, the defendants are entitled to a credit on the amounts granted by this judgment in the sum of $11,022.58 for over charges on interest on the notes of the action to March 1, 1981;

(b) The defendants claim of breach of fiduciary duty and fraud for the plaintiff's calculation using the 360 day basis is unfounded due to the established industry practice followed and lack of intent by the plaintiff;

(c) That the plaintiff has not been arbitrary in calculation of its prime rate by using the methodology of ad-

justing its prime rate in conformity with charges by four out of eight money center banks, and further, defendants were granted the same prime rate as all other borrowers similarly situated;

(d) That as to the mortgage recorded at Mortgage Book 1809, Page 918, in the office of the clerk of Jefferson County, and the note for $250,000.00 dated October 26, 1987, and being all of count three of plaintiff's complaint, was not in default at the time of filing of the complaint, and further the mortgage not providing security to any other debts of the defendants due to certain portions of the mortgage not being properly completed, the plaintiff's complaint is dismissed as to count three without restraint on the plaintiff to refile its complaint for a default occurring after October 28, 1981;

(e) That the term "prime rate" as employed by United Kentucky Bank, Inc. and applied to the uncontraverted facts of this action, is not illusory and, therefore, not a breach of the contract between the parties;

(f) That Kenneth R. George is astute, sophisticated, and experienced borrowers, as reflected in their affidavits in the record;

(g) That the stipulations of counsel dated October 21, 1981 are hereby adopted as findings of this Court.

2. As a matter of law, the setting and charging by United Kentucky Bank, Inc. of its prime rate is not a breach of contract, fraud, or breach of fiduciary duty as to the defendants.

3. As a matter of law, the calculation of interest on a 360 day basis is an overcharge of interest and, therefore, a breach of contract, but is not a fraud or breach of fiduciary duty, owed to the defendants by the plaintiff.

4. That United Kentucky Bank, Inc. is entitled, as a matter of law, to judgment on the five (5) notes attached to its complaint and marked as Exhibits 1, 4, 6, 7 and 11.

5. That the pleadings having been closed, all amendments after June 1, 1982, were not allowed filed.

6. That all previous interlocutory orders are made final by this order.

Order

Therefore, it is the order of this Court that:

1. The plaintiffs recover of the defendants, Kenneth R. George and Alberta W. George, and each of them, jointly and severally, the sum of $723,791.69, plus accrued interest of $143,961.07, calculated on the 365 day basis, plus interest thereon at the rate of the prime rate of interest charged by United Kentucky Bank from time to time, plus one-half percent (½%) per annum from October 15, 1982, plus costs expended by plaintiff herein, until judgment, and interest at the prevailing statutory rate from the date of judgment until paid.

2. That the plaintiff recover of the defendants, Kenneth R. George and Alberta W. George, and each of them, jointly and severally, the principal sum of $1,158,-268.92, with accrued interest of $242,236.90, calculated on a 365 day basis plus the prime rate of interest as charged by United Kentucky Bank from time to time, plus one and one-half percent (1½%) per annum from October 15, 1982, plus costs expended by plaintiff herein, until judgment, and interest at the prevailing statutory rate from the date of judgment until paid.

3. That plaintiff recover of the defendants, Kenneth R. George and Alberta W. George, doing business as Yorktown Lumber Company, and each of them, jointly and

severally, the principal sum of $150,000.00, plus accrued interest of $30,419.16, calculated on a 365 day basis, and interest at the prime rate of interest as charged by United Kentucky Bank from time to time, plus one percent (1%) per annum from October 15, 1982, plus costs expended by plaintiff herein, until judgment and interest at the prevailing statutory rate from the date of judgment until paid.

4. That the plaintiff recover of the defendants, Kenneth R. George and Alberta W. George, doing business as Yorktown Lumber Company, and each of them, jointly and severally, the principal sum of $50,000.00, plus accrued interest of $9,822.53, calculated on a 365 day basis, at the prime rate of interest as charged by United Kentucky Bank from time to time plus one-half percent (½%) per annum from October 15, 1982, plus costs expended by plaintiff herein, until judgment, and interest at the prevailing statutory rate from the date of judgment until paid.

5. The plaintiff recover of the defendants, Kenneth R. George and Alberta W. George, and each of them jointly and severally, the principal sum of $50,000.00, plus accrued interest of $9,882.63, from October 15, 1982, calculated on the 365 day basis, at the prime rate of interest charged by United Kentucky Bank, Inc. from time to time, plus one-half percent (½%) per annum from October 15, 1982 until date of judgment until paid, plus costs expended by the plaintiff herein, and interest from the date of judgment at the prevailing statutory rate until paid.

6. That all counterclaims and affirmative defenses as filed by the defendants are hereby dismissed except as hereinbefore set out.

7. That the plaintiff shall tender an order of sale consistent with its complaint and this order.

8. The attorneys for the plaintiffs are entitled to a fee for their services rendered herein, this matter is hereby retained for further proceedings.

9. Pursuant to CR 54.02(1), it is adjudged that this is a final and appealable judgment, and there is no just reason for delay.

/s/ Richard A. Revell
Judge, Jefferson Circuit Court
Date: October 25, 1982

TENDERED BY:

/s/ Richard Frockt
Richard Frockt
Thurman L. Sisney
BARNETT & ALAGIA
1700 Kentucky Home Life Building
Louisville, Kentucky 40202
(502) 585-4131
Counsel for United Kentucky Bank

Certificate of Service

This is to certify that a true and correct copy of the foregoing has been served, by mailing a copy of same, postage prepaid, to Larry E. Parish, Esq. and John J. Mulrooney, Esq., Parish & Mulrooney, 2125 First Tennessee Building, Memphis, Tennessee 38103, and Theodore H. Amshoff, Jr., Esq. and Richard W. Hill, Esq., Amshoff & Amshoff, 1445 Starks Building, Louisville, Kentucky 40202, counsel for defendants, Kenneth R. George and Alberta W. George, on this 22 day of October, 1982, in accordance with the Kentucky Rules of Civil Procedure.

/s/ Richard Frockt
Richard Frockt

APPENDIX G

(Filed May 27, 1983)

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 83-CA-343-I

NO. 83-CA-727-I

KENNETH R. GEORGE and ALBERTA W. GEORGE
APPELLANTS/CROSS-APPELLEES

v.

UNITED KENTUCKY BANK (f/d/b/a Louisville Trust Bank)
APPELLEE/CROSS-APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 81-CI-09925

AFFIDAVIT OF SERVICE

Comes now affiant, John J. Mulrooney, attorney for appellants/cross-appellees, and makes oath that service by mail was effective this 26th day of May 1983 on Richard Frockt, attorney for appellee/cross-appellant, P. O. Box 1179, Louisville, Kentucky 40202 and The Honorable Richard A. Revell, Judge, Jefferson County Circuit Court, Fourth Division, Hall of Justice, 600 West Jefferson, Louisville, Kentucky 40202.

Further, affiant makes oath that neither he, nor anyone under his instruction or for his benefit, has withdrawn the record on appeal.

/s/ J. Mulrooney
John J. Mulrooney

STATE OF TENNESSEE
COUNTY OF SHELBY

Sworn to and subscribed before me this 26th day of May 1983.

/s/ Joyce M. Eiland
Notary Public

My commission expires: 1-7-84

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 83-CA-343-I

KENNETH R. GEORGE and ALBERTA W. GEORGE
APPELLANTS/CROSS-APPELLEES

v.

UNITED KENTUCKY BANK (f/d/b/a Louisville Trust Bank)
APPELLEE/CROSS-APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 81-CI-09925

APPELLANTS/CROSS-APPELLEES' BRIEF COMBINING ARGUMENTS ON APPEAL AND CROSS-APPEAL

INTRODUCTION

This is an appeal from a summary judgment entered, in part, against appellants/cross-appellees, who below were defendants/counterclaimants (hereinafter "the Georges") in a foreclosure suit filed by appellee/cross-appellant, which below was plaintiff/counter-defendant (hereinafter "UKB"). There is a cross-appeal by UKB from part of that portion of the summary judgment entered against UKB requiring UKB to credit to the Georges an amount held to be interest collected from the Georges because of the way UKB computed interest.

* * *

ISSUE II.

There is no evidence of record upon which the court below could adjudge how much, if any, money was owed to UKB by the Georges.

The error indicated by this stated issue is totally objective and completely indisputable. There simply is no evidence, and by that the Georges mean to say absolutely no evidence, directly or indirectly, affirmatively or impliedly which forms a basis upon which the court below could possibly have found that the Georges were liable in the sum of $2.8 million dollars or any other *amount* of money. Viewing every aspect and every iota of evidence presented in any and all forms in the light most favorable to UKB and assuming every legal issue relative to such facts were resolved in favor of UKB so as to allow it maximum relief, the most which could be produced is that the Georges were liable to UKB because of their failure to make timely payments after February 1981. There is no evidence, in affidavit form or otherwise, as to the *amount of money due*, if any, UKB to satisfy such hypothetical liability.

The motion for summary judgment filed by UKB was not supported by affidavit as to the amount owed. No affidavit filed after the motion for summary judgment can be relied on as supporting the motion for summary judgment. *KRCvP*, Rule 6.04(2). It is true that near the conclusion of the open court hearing in connection with UKB's motion for summary judgment, on October 21, 1982, UKB proported to tender to the court affidavits showing the amount due as a result of the adjudged liability. The Georges requested time to file an opposing affidavit or, at least, to review the tendered affidavit and consider whether to file an opposing affidavit. (Tr. of Hearing on October 21, 1982, pp. 47-58) The court below refused the request of the Georges and commented, in so ruling, as follows in Transcript of Proceedings, October 21, 1982 at page 58:

> THE COURT: Well, I suppose that's a chance you take when you walk into a hearing a motion for a summary judgment.
>
> * * *

However, even if the purported affidavits were a part of the certified record on appeal, for affidavits to be used in support of a motion, the provisions of *KRCvP*, Rule 6.04(2), which reads in pertinent part as follows, must be met:

> When a motion is supported by affidavit, the affidavit shall be served with the motion; and, . . ., opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

In view of the fact that the purported affidavits were not served until the latter part of the last hearing before the court below, it would be impossible to conclude that the affidavits were served with the motion for summary judgment. It is indisputable that the Georges were denied the right to serve an opposing affidavit one day before said last hearing. The right to serve an opposing affidavit at least one day prior to the hearing is secured by *KRCvP*, Rule 56.03.

It is true that Rule 6.04(2) allows a trial court to permit additional time in which to serve an opposing affidavit. However, as the quoted part of the transcript of proceedings on October 21, 1982 indicates, on affirmative request of the Georges to be given additional time within which to file an opposing affidavit, the lower court denied such relief.

* * *

Furthermore, while the circuit court rendered a summary judgment against the Georges thereby allowing interest to be charged at a prime-plus rate during a period including February 21, 1981 through October 14, 1982, absolutely no proof of any kind is of record revealing what rates of interest UKB charged any customers during this period. * * * [T]here is no *proof* of what the UKB prime rate was during that time span.

* * *

APPENDIX H

OPINION RENDERED: February 24, 1984; 10:00 a.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 83-CA-343-MR

KENNETH R. GEORGE and ALBERTA W. GEORGE
APPELLANTS

v.

UNITED KENTUCKY BANK (formerly d/b/a
LOUISVILLE TRUST BANK)
APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE RICHARD A. REVELL, JUDGE
ACTION NO. 81-CI-09925

AND

NO. 83-CA-727-MR
UNITED KENTUCKY BANK (formerly d/b/a
LOUISVILLE TRUST BANK)
CROSS-APPELLANT

v.

KENNETH R. GEORGE and ALBERTA W. GEORGE
CROSS-APPELLEES

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE RICHARD A. REVELL, JUDGE
ACTION NO. 81-CI-09925

AND

No. 83-CA-1398-MR
KENNETH R. GEORGE and ALBERTA W. GEORGE
APPELLANTS

v.

UNITED KENTUCKY BANK (formerly d/b/a
LOUISVILLE TRUST BANK)
APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE RICHARD A. REVELL, JUDGE
ACTION NO. 81-CI-09925

AFFIRMING IN PART - REVERSING AND REMANDING IN PART

BEFORE: McDONALD, REYNOLDS and WHITE, Judges.

WHITE, JUDGE. This opinion covers appellants/cross-appellees' (Kenneth and Alberta George) appeal from a summary judgment on instruments of indebtedness adjudged to be owing appellee/cross-appellant (United Kentucky Bank) and the cross-appeal by United Kentucky Bank in which appellants were given a credit of $11,022.58 as excess interest exacted through a 360-day (annual) computation rather than on a 365-day annual computation. The second appeal involves the order of sale of the mortgaged property to satisfy the judgment amounts awarded in the summary judgment.

The facts and circumstances in these appeals are quite extensive and detailed but are nevertheless so well-known to the parties and counsel herein that we will not attempt to repeat them. Suffice it to say that when the alleged issues are boiled down to the essential elements, it appears that appellants borrowed the money from the appellee Bank and have both in their brief and at oral argument admitted that they owe the Bank something.

They state: "A debt clearly existed or exists by virtue of the loan from UKB to the Georges. There has never been a claim by the Georges that they should not repay the loan with interest." Appellants, however, contend that by using the term "prime rate" plus 1% in some instances and .5% in other instances, no definite and certain interest rate was ever clearly agreed upon. Appellants also contend that by remaking subsequent notes representative of the same indebtedness, such subsequent notes were either payments on the original indebtedness or were acceptance by novation of the original debt.

Finally, because of all the issues so raised, it resulted in genuine material issues of fact that required a trial both as to debt and such interest thereon. The lower court resolved this matter on the basis of determining that all notes were evidence of the original indebtedness supported or secured by the mortgage instruments and that all of same could be and were capable of final determination from the instruments themselves. Thus, concluding that there was no genuine issue of material fact in dispute, the court entered summary judgment for the Bank, but because of the apparent finding that 365/360 was not contemplated as the annual period of computation, there was a credit, translated into a dollar amount of $11,022.58 against the total judgment.

There is no testimony so far as we can find that supports the figure of the judgment, nor can we find in what manner such computation was made. Appellee, of course, contends no amount should have been credited because the 365/360 annual formula was in fact contemplated as the one used in most financial transactions such as this. Oddly enough, appellants also take issue about the translated amount while at the same time arguing that the court was

correct in finding and holding that the 365/360 formula was not the one contemplated by the parties.

After a long and difficult review of the record and a reading and rereading of the briefs, we are convinced and so hold that the lower court has properly addressed this matter in all respects except as to the actual dollar amount allowed as a credit to appellants against the amount owing by them. We also hold that the lower court was correct in adjudging that the mortgage pledging the realty was security for such indebtedness and said property should be sold to apply to such indebtedness. The motion that was interposed in this matter to dismiss the first appeal as not being from a final and appealable judgment or order has been treated as being mooted by the perfecting of the second appeal. We, therefore, hold that said motion be, and it is hereby, denied as moot.

In all respects the judgments of the Jefferson Circuit Court are hereby affirmed on both appeals and the cross-appeal except insofar as to the dollar figures of the credit. That portion of the judgment alone is reversed and remanded for a finding from some evidence or computation that comports with that court's ruling that the 365/360 annual basis was not contemplated in lieu of the 365/365 annual formula and for computation of the difference of fractional percentage to be allowed as the credit.

ALL CONCUR.

ATTORNEYS FOR APPELLANTS/CROSS-APPELLEES:

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Theodore H. Amshoff, Jr.
Amshoff & Amshoff
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Larry E. Parrish
John J. Mulrooney
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Memphis, Tennessee 38103

ATTORNEYS FOR APPELLEE/CROSS-APPELLANT:

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Barnett & Alagia
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Louisville, Kentucky 40202

APPENDIX I

(Filed April 10, 1984)

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 83-CA-343-MR
KENNETH R. GEORGE and ALBERTA W. GEORGE
APPELLANTS

v.

UNITED KENTUCKY BANK (formerly d/b/a
LOUISVILLE TRUST BANK
APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE RICHARD A. REVELL, JUDGE
ACTION NO. 81-CI-09925

AND

NO. 83-CA-727-MR
UNITED KENTUCKY BANK (formerly d/b/a
LOUISVILLE TRUST BANK)
CROSS-APPELLANT

v.

KENNETH R. GEORGE and ALBERTA W. GEORGE
CROSS-APPELLEES

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE RICHARD A. REVELL, JUDGE
ACTION NO. 81-CI-09925

AND

NO. 83-CA-1398-MR
KENNETH R. GEORGE and ALBERTA W. GEORGE
APPELLANTS

v.

UNITED KENTUCKY BANK (formerly d/b/a
LOUISVILLE TRUST BANK)
APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE RICHARD A. REVELL, JUDGE
ACTION NO. 81-CI-09925

AFFIDAVIT OF SERVICE

Comes now affiant, Larry E. Parrish, attorney for appellants and cross-appellees, pursuant to the requirements of *Kentucky Rules of Civil Procedure,* Rule 5.03 and makes oath that service by mail of the foregoing Petition to Rehear of Appellants/Cross-Appellees, Kenneth R. George and Alberta W. George is effective this the 14th day of March 1984 on Richard Frockt, attorney for appellee and cross-appellant, P. O. Box 1179, Louisville, Kentucky 40202.

FURTHER AFFIANT SAYETH NOT.

/s/ Larry E. Parrish
Larry E. Parrish

STATE OF TENNESSEE
COUNTY OF SHELBY

Sworn to and subscribed before me this the 14th day of March 1984.

/s/ Vicky B. Henry
Notary Public

My commission expires 6-3-87

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 83-CA-343-MR
KENNETH R. GEORGE and ALBERTA W. GEORGE
APPELLANTS

v.

UNITED KENTUCKY BANK (formerly d/b/a
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HONORABLE RICHARD A. REVELL, JUDGE
ACTION NO. 81-CI-09925

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NO. 83-CA-1398-MR
KENNETH R. GEORGE and ALBERTA W. GEORGE
APPELLANTS

v.

UNITED KENTUCKY BANK (formerly d/b/a
LOUISVILLE TRUST BANK)
APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE RICHARD A. REVELL, JUDGE
ACTION NO. 81-CI-09925

PETITION TO REHEAR OF APPELLANTS/CROSS-APPELLEES, KENNETH R. GEORGE AND ALBERTA W. GEORGE

On February 27, 1984, appellants/cross-appellees, Kenneth R. George and Alberta W. George (hereinafter "the Georges"), received a copy of the opinion rendered by this court on February 24, 1984. In accordance with *Kentucky Rules of Civil Procedure*, Rule 76.32(1)(b), the Georges * * *

* * *

Item No. 8 in the Appendix on file before this court is a sworn Affidavit of Kenneth R. George, timely filed in opposition to the motion for summary judgment, which contains twenty-three enumerated paragraphs. By enumerated paragraph 8 of Mr. George's Affidavit, he makes oath that it is impossible from information available to him for him to know precisely how much money he had been advanced by UKB under the notes or precisely how much he had repaid under the notes. He gives his best estimate of what he had been advanced and what he had repaid. UKB did not file any proof which could be considered by the court in support of its motions for summary

judgments to show what amount is owed. The figures which Mr. George estimated to be correct are at variance, by money hundreds of thousands of dollars, with the amount ordered paid by the summary judgment below.

* * *

Because it is so obvious that the amount owed by the Georges under the promissory notes is undeterminable from the promissory notes, it is reasonable to assume that the words quoted from the court's opinion were not intended by the court to be literally interpreted.

The only logical conclusion to be drawn is that the court assumed that, even if there is nothing in the record to factually undergird such a conclusion, the Georges knew the outstanding principle balance and the prime rate of UKB which served as the base rate from day to day. Thus, in spite of the fact that Mr. George filed his Affidavit denying such knowledge and an answer demanding strict proof, UKB should not be held to prove the amount owed.

The Georges respectfully submit that the opinion of this court seems to be based on the erroneous conclusion that the amount owed can be discerned from the face of the promissory notes, thus effectively holding that the Affidavit of Mr. George can be ignored without offending any rules of law.

The record below leaves it unquestionable that a genuine issue as to the material fact of the amount of the debt was properly created in the trial court. There was *no proof* which the trial court could consider relative to the amount of the indebtedness. This is not a case involving the sufficiency or substantiality of the proof below. There simply is *no proof* on the questioned matters (amount of debt and interest) to review for sufficiency.

QUESTION 2

2. By what reasoning can the Georges be held to be excluded from the protection afforded litigants under *Kentucky Rules of Civil Procedure,* Rule 6.04(2)?

It would be impossible for either the state of the record below or *Kentucky Rules of Civil Procedure,* Rule 6.04(2) to be more indisputable. Rule 6.04(2) provides, without exception and without prerequisite, that, for an affidavit to be used in support of a motion, the affidavit must be served *with the motion.* UKB served no affidavit with its motion for summary judgment. The record contains not one word from any source of proof other than affidavit by which it may be discerned or implied that the Georges owe any amount certain as a result of any indebtedness of the Georges to UKB, until, on the day the summary judgment was entered, UKB filed affidavits, purportedly to be used in support of its motion for summary judgment, stating that an amount certain was due and owing because of the indebtedness of the Georges.

Kentucky Rules of Civil Procedure, Rule 56.03 and Rule 6.04(2) could not be clearer in requiring that a party opposing a motion for summary judgment, supported by an affidavit *served with the motion,* may file counter affidavits up to one day prior to the hearing on the motion The record could not be clearer that, when UKB filed the affidavits on the day the summary judgment was entered, the Georges requested the court to provide an opportunity for the Georges to file a counter affidavit. Nevertheless, the trial court denied, on the record, the request of the Georges for the opportunity to file countervailing proof. (George Brief, No. 83-CA-343-MR, pp. 21-22)

Without basing its adjudication on the facts contained in the affidavits filed by UKB on the date the summary

judgment was entered, there is not an iota of proof in the record to serve as a foundation for the amount ordered to be paid by the Georges to UKB by the summary judgment.

The ruling of this court, though this issue was raised and fully briefed, does not address these errors. These errors were not held to be harmless, and no reason was given as to why the law so clearly applicable was not applicable in the instant case.

* * *

APPENDIX J

(Filed June 29, 1984)

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 83-CA-343-MR
KENNETH R. GEORGE AND
ALBERTA GEORGE
APPELLANTS

v.

UNITED KENTUCKY BANK (FORMERLY
d/b/a LOUISVILLE TRUST BANK)
APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 81-CI-09925

AND:

NO. 83-CA-727-MR
UNITED KENTUCKY BANK f/d/b/a
LOUISVILLE TRUST BANK
CROSS-APPELLANT

v.

KENNETH R. GEORGE AND
ALBERTA W. GEORGE
CROSS-APPELLEES

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 81-CI-09925

AND:

NO. 83-CA-1398-MR
KENNETH R. GEORGE AND
ALBERTA GEORGE
APPELLANTS

v.

UNITED KENTUCKY BANK (formerly
d/b/a LOUISVILLE TRUST BANK)
APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 81-CI-09925

ORDER

BEFORE: McDONALD, REYNOLDS, and WHITE, JUDGES.

The Court, having considered appellants' motion to file a reply to United Kentucky Bank's response to the petition for rehearing, and having been otherwise sufficiently advised, ORDERS that the motion be, and it is hereby, DENIED.

Having further considered the appellants' motion to strike portions of the response, and having been otherwise sufficiently advised, the Court ORDERS that the motion be, and it is hereby, DENIED.

The Court, having further considered the petition for rehearing, and the response thereto, ORDERS that the petition be, and it is hereby, DENIED.

ENTERED: June 29, 1984

/s/ Charles V. Reynolds
JUDGE, COURT OF APPEALS

APPENDIX K

(Filed July 18, 1984)

COMMONWEALTH OF KENTUCKY
SUPREME COURT

No. .....

NO. 83-CA-343-MR
KENNETH R. GEORGE and
ALBERTA W. GEORGE
MOVANTS

v.

UNITED KENTUCKY BANK (FORMERLY
d/b/a LOUISVILLE TRUST BANK)
RESPONDENT

APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 81-CI-09925

AND:

NO. 83-CA-1398-MR
KENNETH R. GEORGE AND
ALBERTA GEORGE
MOVANTS

v.

UNITED KENTUCKY BANK (formerly
d/b/a LOUISVILLE TRUST BANK)
RESPONDENT

APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 81-CI-09925

AFFIDAVIT OF SERVICE

Comes now affiant, Larry E. Parrish, attorney for movants, pursuant to the requirements of *Kentucky Rules of Civil Procedure,* Rule 5.03 and makes oath that service by mail of the foregoing Motion for Discretionary Review is effected this the 16th day of July 1984 on Richard Frockt, attorney for respondent, P. O. Box 1179, Louisville, Kentucky 40202 and John C. Scott, Kentucky Court of Appeals, 403 Wapping Street, Frankfort, Kentucky 40601.

FURTHER AFFIANT SAYETH NOT.

/s/ Larry E. Parrish
Larry E. Parrish

STATE OF TENNESSEE
COUNTY OF SHELBY

Sworn to and subscribed before me this 16th day of July 1984.

/s/ Fred M. McDonald
Notary Public

My commission expires 11/3/86

COMMONWEALTH OF KENTUCKY
SUPREME COURT

No. .....

NO. 83-CA-343-MR
KENNETH R. GEORGE and ALBERTA W. GEORGE
APPELLANTS

v.

UNITED KENTUCKY BANK (FORMERLY
d/b/a LOUISVILLE TRUST BANK)
APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 81-CI-09925
KENNETH R. GEORGE and ALBERTA GEORGE
APPELLANTS

v.

UNITED KENTUCKY BANK (formerly
d/b/a LOUISVILLE TRUST BANK
APPELLEE

APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NO. 81-CI-09925

MOTION FOR DISCRETIONARY REVIEW

Movants, Kenneth R. George and Alberta W. George (hereinafter "the Georges"), are Florida residents who were sued with a Kentucky corporation in Kentucky. Summary judgment was rendered by the trial court against the Georges. The Georges are represented before this court by Theodore H. Amshoff, Jr., Amshoff & Amshoff, 1445 Starks Building, 455 Fourth Avenue, Louisville, Kentucky 40202 and by Larry E. Parrish, Parrish & Mulrooney, 2108 First Tennessee Building, Memphis, Tennessee 38103.

Respondent, United Kentucky Bank, Inc. (hereinafter "UKB"), was formerly a bank organized according to the laws of * * *

* * *

It also is of extreme importance to understand that UKB filed its motion for summary judgment without an accompanying affidavit. Even though no affidavit was filed *with* the UKB motion for summary judgment, the Georges filed a lengthy affidavit in opposition to the motion for summary judgment creating a genuine dispute as to every material fact. On the very day of the final hearing on the motion for summary judgment, UKB commenced its presentation to the court by filing affidavits of two UKB employees making oath that sums certain were due under the purported obligatory instruments evidencing a debt on the part of the Georges to UKB.

On the record and evidenced by a court reporter transcript of proceedings, the Georges stated that they had never seen the tendered affidavits and requested additional time within which to consider the content of the affidavits and file counter-affidavits. Though these affidavits are the only proof, and there is not a scintilla or an iota of other proof in the record, evidencing that the amount reflected in the summary judgment was owed, the court denied the Georges an opportunity to countervail the affidavits and, when confronted with a plea from the Georges that the court's ruling left them helpless to challenge the evidence, the court remarked, "Well, I suppose that's a chance you take when you walk into a hearing [sic] a motion for a summary judgment."

In its opinion below, the Court of Appeals never alludes to the requirements of *Kentucky Rules of Civil Procedure*, Rule 6.04(2) or Rule 56.03, and entirely avoided the issue

by mistakenly stating that the trial court concluded that the amount due was determinable by simple mathematical computation based on the information appearing on the faces of the claimed notes and mortgages. The trial court made no such finding, by inference or otherwise, because the trial court was well aware that it is impossible to calculate the amount supposedly owed from the information revealed on the faces of those documents. These are not ordinary fixed rate notes which reveal the outstanding principal balance or interest rate. The inference to be drawn from the fact that UKB filed affidavits attempting to show the sums due under the instruments is that sums are not determinable by mathematical computation based on information appearing on the faces of the instruments.

No matter what the Court of Appeals inferred that the trial court found, reference to the faces of the supposed obligatory instruments affirmatively shows the insufficiency of information necessary to compute the amount owed based on the information there revealed. The supposed notes are floating interest rate notes tied to the UKB prime rate. That means that the interest rate fluctuates as often as from day to day dependent on whether the UKB prime rate fluctuated.

Though some persons mistakenly think that there is a universal prime rate knowable by reference to published authority, the prime rate of UKB is unique to UKB and can only be known by reference to the records of UKB. Though the summary judgment includes supposed interest which supposedly accrued between April 1, 1981 and October 15, 1982, there is not one whit of information in the record which either directly or by inference supplies any information concerning what the UKB prime rate was from day to day during that period.

Also, at least two of the supposed notes in question are nothing more than underlying documents supporting lines of credit stating the maximum amount which can be advanced. The procedure employed was for various sums less than the maximum to be advanced from time to time and repaid from time to time so that, on any given day, the only way to know how much loan principal UKB claimed to be outstanding is by specific and detailed reference to the records of UKB.

* * *

* * * answer sufficiently pleads fraudulent inducement or whether the trial court abused its discretion by refusing to allow the Georges to amend.

One of the questions of law presented, reduced to its essence, involves whether, without finding harmless error, a court can totally ignore plain and clearly stated rules of civil procedure where there is absolutely no question that the rules were patently violated. *Kentucky Rules of Civil Procedure,* Rule 6.04(2) could not be more explicit nor mandatory when it says that, when a motion is to be supported by affidavit, "*the* affidavit *shall* be served with the motion." With particular reference to motions for summary judgment, *Kentucky Rules of Civil Procedure,* Rule 56.01 states that a motion for summary judgment may be filed with or without affidavits, but, in no way, allows for the filing of affidavits in support of the motion for summary judgment after the motion is filed. Also, Rule 56.03 explicitly gives the opposing party the right to serve opposing affidavits prior to the day of the hearing. It would be impossible for this right to be exercised if, on the day of the hearing, the summary judgment movant were permitted to file affidavits.

Two things are indisputable in the instant case. . . . [T]he second is that, without the proof tendered in the affidavit filed the final day of the hearing on the motion for summary judgment, there is absolutely no proof of any kind, shape, or fashion by which it is determinable how much, if any, is due under the debt claimed by UKB.

It is indisputable that, when UKB was allowed to file its affidavit on the last day of the hearing on its motion for summary judgment, the Georges affirmatively asked for time within which to file an opposing affidavit, and the trial court denied the request.

The entire controversy in the instant case was over whether UKB had overcharged, by millions of dollars, the Georges. By order of the trial court, both parties had been prohibited from pre-trial discovery or even addressing questions concerning interest accrued or accruing after April 1, 1981 but, when UKB filed its affidavit the last day of the hearing on its motion for summary judgment, it presented proof by affidavit of a debt which included hundreds of thousands of dollars in interest said to have accrued during a period after April 1, 1981. If there were no other reason, the fact that the Georges were literally muzzled by the trial court in an attempt to even address the subject removes the violations of the subject rules from the realm of harmlessness.

* * *

APPENDIX L

(Filed November 8, 1984)

SUPREME COURT OF KENTUCKY
84-SC-575-D
(83-CA-1398-MR & 83-CA-343-MR)
KENNETH R. GEORGE AND ALBERTA W. GEORGE
MOVANTS

v.

UNITED KENTUCKY BANK (formerly d/b/a
LOUISVILLE TRUST BANK)
RESPONDENT

JEFFERSON CIRCUIT COURT
81-CI-09925

ORDER DENYING DISCRETIONARY REVIEW

The motion of the movant for a review of the decision of the Court of Appeals is denied.

ENTERED November 8, 1984.

/s/ Robert F. Stephens
Chief Justice